UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON BRANCH OFFICE

OZBURN-HESSEY LOGISTICS, LLC

and

Case 26-CA-023497
26-CA-023539
26-CA-023576
26-CA-023675
26-CA-023734

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE WORKERS
a/k/a UNITED STEELWORKERS UNION

BRIEF OF COUNSEL FOR THE GENERAL COUNSEL ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

BEFORE: MARK CARISSIMI
ADMINISTRATIVE LAW JUDGE

Respectfully Submitted by:

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I. INTRODUCTION

This hearing involves Compliance Specifications for two separate cases, 26-CA-023497 and 26-CA-23675. On May 20, 2010, Administrative Law Judge George Carson II issued his Decision and Recommended Order in Case 26-CA-023497 finding that Respondent Ozburn-Hessey Logistics, LLC (Respondent), among other unfair labor practices, discharged employees Renal Dotson and Jerry Smith and suspended employee Carolyn Jones for five days in retaliation for their union and protected concerted activities in violation of Section 8(a)(1) and (3) of the Act. (GCX 1(a)).[1] After exceptions were filed, the Board issued a Decision and Order on December 9, 2011 affirming Judge Carson's findings that Respondent unlawfully discharged Dotson and Smith and unlawfully suspended Jones. (GCX 1(a)). As part of the remedy, Respondent was ordered to reinstate Dotson and Smith[2] and make whole Dotson, Smith and Jones for any loss of earnings they suffered as a result of Respondent's unfair labor practices.

On December 27, 2010, Administrative Law Judge John West issued his Decision and Recommended Order in Case 26-CA-023675 finding, among other unfair labor practices, that Respondent unlawfully discharged employee Glorina Kurtycz and unlawfully denied overtime assignments to employee Glenora Rayford in retaliation for their union and protected concerted activities in violation of Section 8(a)(1) and (3) of the Act. (GCX 1(f)). After exceptions were filed, the Board issued a Decision and Order on November 30, 2011 affirming Judge West's findings that Respondent unlawfully discharged Kurtycz and unlawfully denied overtime assignments to Rayford. (GCX 1(f)). As part of the remedy, Respondent was ordered to reinstate

[1] Herein, all references to the transcript and exhibits shall be as follows: Transcript - Tr. page(s); General Counsel Exhibits - GCX; and Respondent Exhibits - RX.

[2] As noted at the hearing, Respondent, on April 15, 2011, reinstated Dotson, Smith and Kurtycz pursuant to a 10(j) injunction order issued by Judge Samuel Mays of the Federal District Court for the Western District of Tennessee.

Kurtycz and make whole Kurtycz and Rayford for any loss of earnings they suffered as a result of Respondent's unfair labor practices.

Respondent subsequently filed requests for review of both Board decisions with the United States Court of Appeals for the District of Columbia Circuit and the General Counsel filed cross-applications for enforcement of the Board's Orders. (GCX 1(b) & (g)). On May 1, 2015 and May 15, 2015, the Court issued Orders denying Respondent's petitions for review and granting the General Counsel's cross-applications for enforcement. (GCX 1(b) & (g)).

On April 29, 2016, the General Counsel issued the Compliance Specifications for both cases at issue in this hearing. On May 20, 2016, Respondent filed its Answer to Compliance Specification for both cases. At the hearing, the General Counsel, based on information of which it became aware after the Compliance Specifications were issued, moved to amend the Compliance Specifications in both cases to correct the backpay calculations for Jerry Smith and Glorina Kurtycz. The General Counsel's motion to amend the Compliance Specifications was granted. The corrected backpay calculations for Smith are contained in the attachment to Compliance Specification for Case 26-CA-023497 in "Exhibit 4 – Revised" and the corrected backpay calculations for Kurtycz are contained in the attachment to the Compliance Specification for Case 26-CA-023675 in "Exhibit 2 – Revised."

II. UNLAWFULLY DISCHARGED EMPLOYEES RENAL DOTSON, JERRY SMITH AND GLORINA KURTYCZ

The compliance specifications for Cases 26-CA-023497 and 26-CA-023675 state the backpay calculations for three employees - Renal Dotson, Jerry Smith and Glorina Kurtycz - who the Board found were unlawfully discharged by Respondent.[3] At the hearing, Respondent

[3] At the start of the hearing, General Counsel and Respondent stipulated as to the gross backpay owed to discriminatee Carolyn Jones. The parties agreed that the gross backpay for Jones is $502.96 and that interest and excess tax liability, if any, would be calculated at the time of payment by Respondent. (Tr. 7).

stipulated that the method of calculation for backpay for all three discriminatees, including the backpay formula and comparator employees used in the calculations, were appropriate. (Tr. 23-4, 32-3). With regard to gross backpay owed to the three discriminatees, Respondent, in its answers to both compliance specifications, asserted only that the discriminatees were not eligible for overtime and double time pay during the backpay period because the average weekly hours for each discriminatee during the backpay period, as calculated by Compliance Officer Debra Warner, was less than 40 hours per week. (GCX 1(e) & (j)). Respondent further asserts that the discriminatees failed to mitigate damages by failing to adequately search for interim employment during portions of the backpay period and/or misrepresented or failed to report all interim earnings to the Board. As will be demonstrated below, each of these contentions lacks merit.

A. Legal Framework

A finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed. *Minette Mills, Inc.*, 316 NLRB 1009, 1010-1011 (1995); *Arlington Hotel Co.*, 287 NLRB 851, 855 (1987), enfd. in part. 876 F.2d 678 (8th Cir. 1989); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2nd Cir. 1965), cert. denied, 384 U.S. 972 (1966). The General Counsel's burden in a backpay proceeding is limited to showing the gross backpay due each discriminatee. *J.H. Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 230- 231 (5th Cir.) cert. denied, 414 U.S. 822 (1973). The General Counsel has discretion in selecting a formula that will closely approximate backpay. He has the burden of establishing only that the gross backpay amounts contained in a compliance specification are reasonable and not an arbitrary approximation. *Performance Friction Corp.*, 335 NLRB 1117 (2001) and *Mastel/ Trailer Corp.*, 273 NLRB 1190 (1984). Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable, as long as it is not unreasonable or

arbitrary under the circumstances. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), enfd. mem. 48 F.3d 1232 (10th Cir. 1995). Once the gross backpay amount is established, the burden shifts to the employer to establish facts that would negate or mitigate its liability. *Grosevnor Resort*, 350 NLRB 1197, 1198 (2007); *Millennium Maintenance & Electrical Contracting*, 344 NLRB 516, 517 (2004); *United States Can Co.*, 328 NLRB 334, 337 (1999), enfd. 254 F.3d 626 (7th Cir. 2001); *Mastro Plastics*, supra.

When a respondent argues that a discriminatee has failed to adequately search for interim work, the Board has held that the respondent must satisfy a burden of coming forward with evidence that substantially equivalent jobs existed in the relevant geographic area during the backpay period. *St. George Warehouse*, 351 NLRB 961, 967 (2007). If the respondent does so, the burden then shifts to the General Counsel to "produce competent evidence of the reasonableness of the discriminatee's job search." *Id.* In the end, however, the respondent bears the ultimate burden of persuasion concerning whether an unlawfully discharged employee made an adequate search for interim employment. *Id.* at 964.

With regard to misrepresentation or failure to report all interim earnings, the Board has stated that it would deny backpay for any quarters in which a discriminatee has willfully concealed interim employment but "only in cases where the claimant is found to have willfully deceived the Board, and not where the claimant, through inadvertence, fails to report earnings." *American Navigation Co.*, 268 NLRB 426, 428 (1983); See also *Hagar Management Corp.*, 323 NLRB 1005, 1007 (1997); *Brown Co.*, 305 NLRB 62, 67–68 (1991). Thus, "poor recordkeeping, uncertainty as to memory, and perhaps exaggeration" do not automatically disqualify an employee from receiving backpay. *Pat Izzi Trucking Co.*, 162 NLRB 242, 245 (1966), enfd. 395 F.2d 241 (1st Cir. 1968). More importantly, the respondent bears the burden of proof on this

matter and must show that any discrepancies reflect willful concealment of earnings from the Board. *Cibao Meat Products*, 348 NLRB 47, 48 (2006); See *Atlantic Limousine, Inc.*, 328 NLRB at 257, enfd. 243 F.3d 711 (3d Cir. 2001) (citing *Paper Moon Milano*, 318 NLRB 962, 963 (1995)).

B. Discriminatees Are Entitled to Pay for Overtime and Double Time Hours

In its answers to the Compliance Specifications, Respondent asserted, because the average weekly hours for Dotson, Smith and Kurtycz as calculated by Compliance Officer Warner were under 40 hours per week, none of the employees would be owed backpay for overtime and double time hours. (GCX 1(e) & (j)). This argument is wholly without merit. As explained by Warner, Respondent provided a lump sum total of regular, overtime and double time hours worked by comparator employees for each of the discriminatees during the respective backpay periods. (Tr. 32-3). Respondent did not break down these hours into smaller increments, such as quarters, months or weeks, or provide the information needed to assign the hours to smaller units of time. (Tr. 32-3). As such, Warner calculated the average hours per week for each discriminatee by dividing the total hours worked by each comparator by the total number of weeks in the backpay period and then computing the average hours per week by dividing the total number of comparators by the sum of the average weekly hours for each comparator. (Tr. 31-3). The average hours per week for each discriminatee using this method of computation was under 40 hours per week.

Nonetheless, as pointed out by Warner, the comparator employees worked overtime and double time hours during the backpay periods for each discriminatee. (Tr. 32-3). Because the comparator employees worked overtime and double time during the backpay period, the presumption is that the discriminatees would also have been eligible to work these overtime and

double time hours as well. (Tr. 32-3). Because the overtime and double time hours could not be assigned to a particular pay period, the appropriate method to calculate the lost overtime and double time pay for each discriminatee would be to calculate the averages for these hours using the same formula for computing regular hours. Thus, despite the average regular hours for each discriminatee during the backpay period being under 40 hours, the evidence supports a finding that Dotson, Smith and Kurtycz should also be compensated for the lost overtime and double time hours they would have worked had they not been unlawfully discharged by Respondent.

C. Renal Dotson

Renal Dotson was unlawfully discharged by Respondent on August 28, 2009. The backpay period for Dotson runs from that date to April 15, 2011, the date he was reinstated by Respondent pursuant to a 10(j) injunction order issued by Judge Samuel Mays of the Federal District Court for the Western District of Tennessee. Dotson testified that, during the backpay period, he actively sought interim employment as is reflected in the job search information he provided to the Board during the backpay period. (GCX 3). The employment and expense reports submitted to the Board by Dotson reflect that he began looking for interim employment within 4 days after his discharge and, over the following 19 ½ months, continued to inquire with prospective employers to determine if the employer was hiring or submitted applications for employment. (GCX 3). Dotson further testified that he made himself available for work assignments through temporary staffing companies and received at least four work assignments through temporary staffing companies, including Staffmark, Staff Line and Labor Finders, during the backpay period. (Tr. 160-1; GCX 2 & 3). Dotson testified he also visited job fairs to attempt to submit employment applications or find employment. (Tr. 184-5).

While Dotson testified that he was actively seeking interim employment, he acknowledged in his testimony that the employment and expense reports and his notes reflect brief periods of time during the backpay period when he listed only a few or no employers with whom he attempted to get hired. (Tr. 178-9; 186-8; GCX 3). Dotson testified, without rebuttal, that his ability to find interim employment was substantially hampered by his living situation and lack of transportation during the backpay period. Dotson testified that, following his discharge, he was unable to pay his rent at the address where he had been living and had to move out soon after his discharge. (Tr. 165-6, 193-4).[4] Dotson stated that, after being forced to vacate his prior address, he did not have a fixed address for the vast majority of the backpay period. (Tr. 193-4). Instead, Dotson testified that he moved around among family members and friends who could take him in and provide Dotson a place to sleep for, at most, a few consecutive days at a time. (Tr. 165-7, 193-4).

During the time Dotson worked for Respondent prior to his discharge in August 2009, Dotson testified that he did not have a car but was able to get to and from work at Respondent's facility by getting rides from a close female friend or friends of his who also worked for Respondent. (Tr. 169, 192). Following his discharge, Dotson was unable to purchase a car or another reasonable means of transportation to use when looking for interim employment. (Tr. 192-3). Thus, in order to go to potential interim employers to submit applications or secure work, Dotson had to rely almost exclusively on family members or friends who had the time and means to drive Dotson around Memphis to look for work. (Tr. 163-4, 170-1). Dotson testified

[4] Dotson testified that he applied for unemployment following his discharge and initially it was approved by the State of Tennessee (Tr. 206-7). However, Respondent appealed this decision and, on appeal, the decision to grant unemployment benefits to Dotson was reversed. (Tr. 206-7). Dotson was thus, through the efforts of Respondent, left without any income in the months following his discharge. In addition, the State of Tennessee immediately sought to recoup the benefits paid to Dotson prior to the decision on appeal, which Dotson noted he has still been unable to pay in full nearly seven years later. (Tr. 206-7).

that he attempted to go out to look for work as often as possible but family members or friends who had a vehicle and time during the work day to dedicate multiple hours to Dotson's job search were not readily available on a regular basis. (Tr. 163-4, 170-1). Dotson further testified, without rebuttal, that his job search was limited to the locations where the family member driving Dotson around town was willing to take him. (Tr. 163-4). Dotson also testified, because of his lack of a permanent address or reliable transportation, he was only able to intermittently check his mail at the P.O. Box he was using. (Tr. 194)

Dotson further testified that his job search was limited by his lack of a telephone during the backpay period. (Tr. 194-5, 200-1). Dotson stated he previously had a "pay as you go" cell phone plan but was rarely able to keep his cell phone operational because of his lack of income. (Tr. 194-5, 200-1). In order to make calls, Dotson had to either borrow a cell phone from a family member, such as an uncle whose cell phone only provided 30 minutes of call time per month, in order to contact employers. (Tr. 195-6). Dotson said he had to list his sister's cell phone number on applications as his contact number because he did not have reliable telephone service. (Tr. 195-6). As a result, if an employer or a temporary staffing agency attempted to contact him, the employer would have to call Dotson's sister who would then have to track down Dotson to relay any message or information to him. (Tr. 195-6, 200-1). Finally, Dotson testified he was unable to search on-line job listings because he did not have cell phone service or own or have access to a computer during the backpay period. (Tr. 186, 195-6)

D. Jerry Smith

Jerry Smith was unlawfully discharged by Respondent on August 28, 2009. The backpay period for Smith runs from that date to April 15, 2011, the date he was reinstated by Respondent pursuant to a 10(j) injunction order issued by Judge Samuel Mays of the Federal District Court

for the Western District of Tennessee. Smith began looking for interim employment within the first two weeks after he was discharged by Respondent and he recorded the names of the employers with whom he attempted to get hired on the employment and expense reports submitted to the Board. (GCX 5). Smith was subsequently hired by Methodist Hospital to work at its facility in Germantown, Tennessee and started work for Methodist on or about October 15, 2009. (GCX 5). Smith testified that he worked full-time for Methodist in some capacity until he was reinstated by Respondent. (Tr. 224-5). Smith testified that during part of 2010, he worked a second job through an employer he identified as Service Master where he worked part-time during the evening or night hours cleaning buildings. (Tr. 212-6). Smith testified that he continued to work full-time for Methodist while also working for Service Master and that he eventually quit the Service Master job because of transportation issues. (Tr. 215-6). Smith further testified that he transferred to a different area or department of Methodist in 2010 so that he could work a different shift while he returned to school. (Tr. 224-5). Smith testified that his pay rate remained the same following the transfer and there was no break in his service with Methodist prior to the transfer. (Tr. 224-5).

Smith testified that he attempted to record all of his interim earnings on the employment and expense report forms provided by the Board but could not recall specifically why or how he arrived at the amounts he listed on the reports. (Tr. 220-3, 227). The reports show that Smith reported working for Methodist in every quarter between the fourth quarter of 2009 to the first quarter of 2011 and reported his work for Service Master on the report for the first quarter of 2010. (GCX 5). Compliance Officer Warner testified she spoke with Smith about the interim earning amounts he included on the reports after she received the Social Security report which showed that Smith may have miscalculated his interim earnings but he was unable to provide any

clarity on this issue since more than five years had passed since he prepared the reports submitted to the Board. (Tr. 38-41, 71-2). At the hearing, Smith testified that it was possible he made the interim earning calculations by multiplying the numbers of weeks or months he had worked by his wage rate at Methodist but was uncertain as to how exactly the calculations were done. (Tr. 210).

E. Glorina Kurtycz

Glorina Kurtycz was unlawfully discharged by Respondent on March 2, 2010. The backpay period for Kurtycz runs from that date to April 15, 2011, the date she was reinstated by Respondent pursuant to a 10(j) injunction order issued by Judge Samuel Mays of the Federal District Court for the Western District of Tennessee. Kurtycz testified that she began looking for interim employment soon after discharge by Respondent but did not start keeping track of where she had applied or dropped off resumes until the start of April 2010, after she received an earnings and expense report from the Board. (Tr. 114-5). Kurtycz said that, during the period from the end of March 2010 until September 2010, she submitted applications to several employers, which she recorded on the earnings and expense reports. (Tr. 114-5; GCX 8). Kurtycz said that she also dropped off resumes at numerous employers during that same period of time but did not record the names of these employers on the reports. (Tr. 114-5). Kurtycz testified that she dropped off resumes with employers at least two or three times each week while she was unemployed but could not recall the names of these employers. (Tr. 118-9). Kurtycz eventually secured a short term position through Select Staffing in September 2010 which lasted approximately one week. (Tr. 122-3; GCX 8). Immediately following this short term work assignment, Kurtycz was hired by an employer identified as "Frank Crum" (also identified by Kurtycz as "Diversified.") (Tr. 122-3). Kurtycz testified she worked for "Frank Crum" as a full-time employee until she was reinstated by Respondent. (Tr. 122-3).

F. Dotson, Smith and Kurtycz Made Adequate and Reasonable Searches for Interim Employment

As noted above, when a respondent asserts that a discriminatee has failed to adequately search for work during the backpay period, the respondent must first establish that substantially equivalent jobs existed in the relevant geographic area during the backpay period. *St. George Warehouse*, 351 NLRB at 967. In *St. George Warehouse*, the employer presented this evidence through the testimony of an expert witness who analyzed job and economic data for the area during the relevant time period, examined classified advertisements from local newspapers and performed a study of the transferability of the job skills of the discriminatees (who were both warehousemen). *Id.* at 962. In this case, however, Respondent's testimony concerning the availability of substantially equivalent jobs consisted of two parts. First, Respondent introduced a collection of classified advertisements from the *Commercial Appeal*, the newspaper for the Memphis metropolitan area. (RX 6). Second, Respondent had Regional Human Resources Manager Lisa Johnson testify concerning whether the advertisements sought employees with job skills similar to those of Dotson, Smith and Kurtycz. (Tr. 246-50). Johnson was not presented as an expert witness by Respondent concerning this issue and only offered her general opinion about the jobs described in the classified advertisements. (Tr. 246-50). Johnson, however, did not provide any detailed information concerning the jobs described in the classified advertisements, including the hours, wage rates and working conditions for the advertised jobs, whether any of the advertised positions were still available at the time the advertisements ran in the paper or whether any of the discriminatees were specifically qualified for the advertised positions or would have been hired if any of the discriminatees had applied for the positions. The Board has generally held that this type of evidence is not sufficient to satisfy the Respondent's burden to establish that substantially equivalent jobs existed in the relevant

geographic area. *E & L Plastics Corp.*, 314 NLRB 1056 (1994); *Delta Data Systems Corp.*, 293 NLRB 736, 737 (1989); *Arlington Hotel Co.*, 287 NLRB 851, 853 (1987), enf. granted in part, denied in part 876 F.2d 678 (8th Cir. 1989); *Airport Services Lines*, 231 NLRB 1272, 1273 (1977), enfd. mem. 589 F.2d 1115 (D.C. Cir. 1978).

Even assuming that this evidence is found sufficient to meet Respondent's burden, the evidence does not support a finding that any of the discriminatees failed to adequately and reasonably search for work. As described above, all three discriminatees began their search for interim employment within about two weeks for their respective dates of discharge. Jerry Smith was able to secure interim employment, which he continued to work during the remaining backpay period, within 1 ½ months after his discharge. (GCX 5). Glorina Kurtycz testified that she began looking for interim employment soon after her discharge in March 2010 and she continued to submit applications and resumes to prospective employers and conduct on-line searches for work until she found a temporary positions starting in September 2010. (Tr. 114-5). Kurtycz continued to work in one of the positions until her reinstatement. (Tr. 134-5).

Renal Dotson submitted documentation and testified that, despite not being able to secure interim employment beyond some short-term temporary work, he continued to actively search for interim employment during the entire backpay period. (Tr. 157-9; GCX 3). Dotson did acknowledge though that there were brief periods of time when he recorded little or no search for work activity. (Tr. Tr. 178-9; 186-8; GCX 3). Dotson credibly testified that his ability to actively search for work was, at times, limited based on his lack of transportation, a fixed address or a readily available telephone during the backpay period.

In *Grosevnor Resort*, the Board held that a discriminatee can be disqualified from backpay for periods of time if the discriminatee fails to engage in an adequate search for work.

Id. at 1201. However, the Board recognized exceptions to this rule specifically stating that an inadequate search for work can be excused where the search for work is limited by transportation issues. *Id.* at 1200, fn. 16. In that case, two of the discriminatees had a limited search for work during a portion of the backpay period because neither employee drove or had available transportation during the work day. *Id.* at 1243, 1251. Based on the undisputed testimony that neither employee had available transportation, the Board refused to disqualify either employee from receiving backpay during a period of time when the employees otherwise would have been denied backpay. *Id.* at 1200, fn. 16. Dotson's circumstances were demonstratively worse than the employees in *Grosevnor Resort* in that Dotson not only lacked reliable transportation during the entire backpay period but also lacked a fixed address or reliable access to a phone after he was forced to vacate his prior residence dues to financial issues. In addition, Respondent knew at the time it discharged Dotson that he did not have a vehicle and had to get a ride to and from work each day. (Tr. 192). Based on Dotson's unrebutted testimony concerning the financial and personal hardships he suffered as a direct result of his unlawful discharge by Respondent, General Counsel asserts it would be grossly unfair to penalize Dotson for his inability to acquire steady interim employment or short gaps in his search for interim employment.

G. None of the Discriminatees Willfully Concealed Interim Earnings or Interim Employment

When a respondent asserts that a disciriminatee should be denied backpay based on a claim that the discriminatee willfully concealed interim earnings, the Board has held that it will disqualify a discriminatee only in cases where the discriminatee is found to have willfully deceived the Board, and not where the individual, through inadvertence, fails to report earnings. *American Navigation Co.*, supra; see also *Hagar Management Corp.*, supra; *Brown Co.*, supra. In its Answers to the Compliance Specifications, Respondent put forth the affirmative defense

that backpay should be reduced for all three discriminatees based on their failure to report all interim earnings. At the hearing, Respondent failed to adduce any evidence that Dotson, Smith or Kurtycz failed to report any interim earnings during the backpay period. The only evidence put forth by Respondent on this issue is that some of the amounts reported by Smith, Dotson and Kurtycz for interim earnings on the employment and expense reports submitted to the Board were lower than the earnings reported by the Social Security Administration or as calculated by Compliance Officer Warner. (Tr. 78-81, 122-5, 220-3; GCX 3, 5, 8; RX 3, 4). The Board has held that the presence of mere discrepancies between interim income reported to the Board and income reflected on other documents is insufficient to satisfy the Respondent's burden of proof that a discriminatee willfully concealed interim earnings from the Board. *Cibao Meat Products,* 347 NLRB at 48; *Atlantic Limousine, Inc.*, 328 NLRB at 257. In this case, Respondent has offered no evidence, other than the mere differences themselves, to show that any of the discriminatees willfully concealed or attempted to conceal interim earnings from the Board during the compliance investigation or at the hearing. Because Respondent has not satisfied its burden of proof on this issue, this affirmative defense should be rejected.

III. CALCULATION OF OVERTIME HOURS FOR GLENORA RAYFORD

A. Calculation of Overtime Hours by Compliance Officer Warner

In its decision, the Board found that Respondent unlawfully refused to permit Glenora Rayford[5] to work overtime hours in the Remington account in retaliation for her union support and activities. The Board stated that the starting date when Respondent began refusing Rayford the opportunity to work in the Remington account was November 18, 2009. (GCX 1(h)). The refusal to permit Rayford to work overtime in the Remington account continued until the end of

[5] At the hearing, Rayford testified that she currently goes by the name Glenora Whitley following her marriage in 2012. For purposes of this brief, General Counsel will use Rayford in order to avoid confusion.

2011 when Rayford voluntarily chose to cease seeking these overtime assignments. (Tr. 54-5; 300-1). Compliance Officer Warner testified that, based on Rayford's decision to stop requesting overtime work in the Remington account at the end of 2011, she determined that the backpay period for calculating backpay for Rayford would run from November 18, 2009 to December 31, 2011.[6]

In conducting the compliance investigation, Warner testified she requested Respondent provide payroll records which would show or reflect the overtime hours worked by non-Remington account employees during the backpay period. (Tr. 55). Warner testified, without rebuttal, that Respondent informed her that it no longer had any payroll records for the Remington account for the entire backpay period. (Tr. 55). Warner stated she discussed methods for calculating backpay owed to Rayford with Respondent but Respondent declined to provide any alternate records or propose any specific method for determining the backpay owed to Rayford. (Tr. 55). Because Respondent claimed the records no longer existed, Warner stated she reviewed the trial record, including the exhibits, for the hearing held in Case 26-CA-023675. (Tr. 55). In reviewing the trial exhibits, Warner said she found timekeeping records for Rayford which showed Rayford's work hours for the period from August 11, 2009 to July 2, 2010, including her overtime hours worked in the Remington account prior to November 18, 2009. (Tr. 55; GCX 10). Warner also found timekeeping records for employees Alfred Stewart, Alvin Fitzgerald and Wanda Staples which covered the period from November 1, 2009 to May 21, 2010 and reflected overtime hours worked by all three individuals in the Remington account between November 2009 and May 2010. (Tr. 55; GCX 11). Warner testified that these limited records were utilized to determine the backpay owed to Rayford. (Tr. 55).

[6] As explained later in this Section, Respondent asserts that the backpay period for Rayford should end as of April 11, 2011 when it allegedly sent a letter to Rayford informing her that, pursuant to the District Court's 10(j) injunction order, Respondent would permit Rayford to resume overtime work in the Remington account.

Warner explained that she reviewed these records and found all identifiable instances where the records reflected that Rayford or the comparator employees worked overtime in the Remington account. (Tr. 56-9). Warner said she compiled the overtime hours worked by Rayford and the comparator employees in the Exhibit 3 attachment to the Compliance Specification for 26-CA-023675. (Tr. 56-9; GCX 1(h)). The records showed that Rayford worked overtime in the Remington account on five separate workdays over the course of a two week period in October 2009 and had worked two consecutive weekend days near the end of September 2009.[7] (Tr. 56-9; GCX 10). As to the comparators, the records showed that all three employees had performed weekend overtime work in the Remington account in both February and March 2010. (Tr. 56-9; GCX 11). Warner testified, in order to determine averages for the overtime work Rayford would have been permitted to work in the Remington account, she determined Rayford would have worked three weekdays per month in the Remington account for about 2 ½ hours each day. (Tr. 56-9; GCX 1(h)). Warner further testified that, based on the work by the comparators in consecutive months in 2010, she estimated that Rayford would have worked one weekend per month in the Remington account for about 20 hours each weekend. (Tr. 56-9; GCX 1(h)). Warner stated, while the timekeeping records did not show that the comparator employees worked one weekend each month in the Remington account, the records do not establish that no overtime work was available in the Remington account in the other months or whether the comparators declined available overtime assignments. (Tr. 56-9; GCX 1(h)). Furthermore, while the timekeeping records do not show the comparator employees

[7] In the unfair labor practice hearing for Case 26-CA-023675, Rayford testified she started working overtime in the Remington account in or around July 2009 but did not provide specific information about the number of days or number of overtime hours she worked in the Remington account in July 2009. (RX 2). Because the timekeeping records presented as evidence in the unfair labor practice hearing had a starting date of August 11, 2009, these potential overtime hours from July 2009 could not be included in Compliance Officer Warner's backpay calculations. (GCX 10).

working overtime in the Remington account on weekdays, the timekeeping records for Rayford show that she had worked overtime hours on weekdays while the timekeeping records for the comparator employees fail to establish that no weekday overtime work was available or whether the comparator employees declined available overtime hours. (Tr. 56-9; GCX 1(h), 10, 11).

Warner testified she communicated these calculations to Respondent prior to issuance of the Compliance Specification and Respondent failed to propose any alternative method for determining the backpay liability owed to Rayford. (Tr. 60). In its Answer to the Compliance Specification, Respondent denied that Rayford would have worked the amount of overtime assigned to her in the backpay calculations based on fluctuations in the availability of overtime work in the Remington account. (GCX 1(j)). However, Respondent did not propose any alternate methods for determining the backpay liability owed to Rayford or provide additional documents or records which contained supporting figures for any proposed alternate methods for calculating backpay for Rayford. (GCX 1(j)).

B. The General Counsel's Estimates of Overtime Hours for Rayford Are Reasonable and Appropriate

In challenging the General Counsel's backpay calculations, the burden is on the employer who committed the unfair labor practice to establish facts that reduce the amount due for gross backpay. *Atlantic Limousine*, 328 NLRB at 258; *Florida Tile Co.*, 310 NLRB 609 (1993), enfd. 19 F.3d 36 (11th Cir. 1994). Any uncertainty about the amount of backpay owed to a discriminatee is resolved in his or her favor and against the respondent whose violation caused the uncertainty. *Alaska Pulp Corp.*, 326 NLRB 522 (1998), enfd. in part, 231 F.3d 1156 (9th Cir. 2000); *Intermountain Rural Electric Ass'n*, 317 NLRB 588, 590-591 (1995), enfd. mem. 83 F.3d 432 (10th Cir. 1996). In challenging the backpay calculations for Rayford at the hearing, Respondent argued that Warner, by calculating that Rayford would have worked overtime on

three weekdays and two weekend days per month, overestimated the amount of overtime which was available in the Remington account. (Tr. 86-91). Respondent asserted that the timekeeping records for Rayford reflect that she only worked two weekend days and portions of five weekdays in the Remington account between August 11 and November 18, 2009. (Tr. 86-9). Warner testified that Rayford had only started working overtime in the Remington account within that time frame and the records do not establish whether overtime work was available in the Remington account on other days which Rayford was unable to work. (Tr. 86-9).

Respondent further asserted that the timekeeping records for the three employees utilized as comparators showed that these employees only worked two weekends in total between November 2009 and May 2010. (Tr. 90-4). Warner testified the records do not establish that overtime work was unavailable in the Remington account in the other months or whether the comparator employees declined to perform available overtime work in the other months. (Tr. 90-2). Because of the lack of timekeeping or payroll records[8], Warner was forced to make a number of assumptions concerning the availability of overtime work in the Remington account during the backpay period and uncertainties in making the calculations are resolved in favor of the discriminatee. (Tr. 92-4). Respondent offered no legally permissible evidence which would establish that the backpay calculations for Rayford were unreasonable or inappropriate.

[8] General Counsel would note that the decision by Judge West in which he first found that Respondent violated the Act by unlawfully denying Rayford the opportunity to work overtime in the Remington account was issued on December 27, 2010. (GCX 1(f)). Respondent has known since the date of the Judge's decision that it may later need to produce payroll or timekeeping records which would assist the Board in calculating backpay owed to Rayford but still failed to preserve any such records. Thus, while Respondent may complain that the Board made incorrect assumptions concerning the availability of overtime in the Remington account during the backpay period, this is a problem of Respondent's own making.

C. Respondent Should Be Precluded from Presenting Documents Which Allegedly Reflect Overtime Hours Worked in the Remington Account and Respondent's Exhibit 8 Should Be Stricken

Section 102.56(b) of the Board's Rules and Regulations states, "…if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures." Section 102.56(c) of the Rules and Regulations further provides that, if a respondent's answer fails to deny an allegation in the compliance specification in the manner required by Section 102.56(b), and a respondent fails to adequately explain its failure to deny the allegation in its answer, the respondent shall be precluded from presenting evidence concerning the improperly denied allegation and the allegation in the compliance specification shall be deemed to be admitted as true. As noted above, Respondent failed to produce any payroll or timekeeping records during the compliance investigation which would assist the Board in calculating backpay owed to Rayford. Also as explained above, Respondent, in its Answer to the Compliance Specification for 26-CA-023675 asserted that the backpay calculations for Rayford were incorrect but failed to include any proposed alternate formula or supporting figures for calculating Rayford's backpay. (GCX 1(j)). Thus, while Respondent's Answer states reasons for its disagreement with the accuracy of the backpay calculations, the Answer does not contain any detail concerning the applicable premises for the disagreement or furnish any supporting figures to support its argument. (GCX 1(j)).

Nonetheless, at the hearing, Respondent sought to introduce billing records for the Remington account for the period from November 8, 2009 to April 30, 2011 which it claimed would allow for more accurate calculation of the backpay owed to Rayford. (Tr. 255-64; RX 8).

General Counsel objected to the introduction of the billing records and argued that Respondent should be precluded, pursuant to Section 102.56(b) and (c) of the Board's Rules and Regulations, from presenting the evidence for the first time at the hearing. (Tr. 255-64). Respondent's counsel stated at the hearing that Respondent only became aware of the availability of these records on the Thursday prior to the hearing and thus the information contained in the billing records could not be addressed in its Answer to the Compliance Specification. (Tr. 262-3). However, it is noteworthy that Respondent offered no explanation as to why the documents were not locatable prior to the date when they were allegedly discovered. Based on the assertions of Respondent's counsel, the records were certainly available either within Respondent's own business records or from some other source well prior to the hearing. In addition, despite acquiring these records prior to the hearing, Respondent did not provide General Counsel with the records prior to the hearing or make any request prior to the hearing to be permitted to amend its Answer to bring in into compliance with Section 102.56(b). Finally, despite offering the billing records as evidence which it asserts could support a more accurate method for calculating the backpay owed to Rayford, Respondent offered no details concerning any alternate formula for calculating the backpay or analysis of the supporting figures allegedly contained in Respondent Exhibit 8. Because Respondent failed to provide any details concerning an alternate method for calculating backpay or an analysis of the supporting figures for any alternate formula prior to or even at the hearing, General Counsel has been denied the opportunity to question any witnesses, including cross-examination of Respondent's witnesses, concerning any alternate backpay formula and supporting figures. Thus, because these documents were available to Respondent at the time it filed its answer and, at a minimum, prior to the hearing, and because of the prejudicial effect of denying General Counsel the opportunity to question or challenge

Respondent's witnesses concerning any alternate backpay formula Respondent intends to put forth in its post-hearing brief, Respondent should be precluded from presenting the Remington account billing records at the hearing. See *Local 3, Int'l Brotherhood of Electrical Workers, AFL-CIO*, 315 NLRB 1266 (1995).

General Counsel would further note that billing records alone do not contain enough information to make them useful as an alternate means for calculating the backpay owed to Rayford. (RX 8). Specifically, the records do not contain any specific means to easily differentiate between employees assigned to the Remington account and non-Remington employees working in the account during the weeks in question. (RX 8). While Regional HR Manager Johnson testified that non-Remington employees could be identified by the lack of regular time hours, she agreed that non-Remington employees could be working in that account via "labor loan" and may not be properly identified. (Tr. 255-8, 267-70). In addition, while the timekeeping records utilized by Warner to calculate Rayford's backpay reflect that Alvin Fitzgerald worked weekend overtime in the Remington account during the week ending March 28, 2010, Respondent Exhibit 8 does not show Fitzgerald working in the Remington account at any time during that week. (GCX 11; RX 8). Thus, Respondent Exhibit 8, by itself, will not provide a more sufficient or more accurate means to calculate the backpay owed to Rayford and reliance on this exhibit to recalculate Rayford's backpay would be inappropriate.

D. The Backpay Period Should Be Extended to December 31, 2011 Based on Respondent's Failure to Inform Rayford Concerning the District Court 10(j) Order

Respondent argues that the backpay period for Rayford should extend only to April 13, 2011, and not December 31, 2011, because it claims Rayford was informed by letter dated April 11, 2011 that she was eligible and would be assigned, upon request, to work available overtime

in the Remington account. Former Regional Human Resources Manager Evangelia Young testified that, following the issuance of the 10(j) injunction order by the Federal District Court which required that Respondent reinstate Renal Dotson, Jerry Smith and Glorina Kurtycz and permit Rayford to work overtime hours in the Remington account, she had HR employee Dani Bowers send letters via FedEx to Smith, Kurtycz and Rayford and by certified mail to Dotson concerning the injunction order. (Tr. 316-8; RX 5). Rayford, however, denied that she receive any such letter from Respondent via FedEx or any other means in April 2011. (Tr. 298).

In support of its claim that it delivered the April 11, 2011 letter to Rayford via FedEx, Respondent produced a document which it asserts establishes proof of delivery of the letter to Rayford. (RX 1). While Young testified Respondent Exhibit 1 is the FedEx receipt generated after delivery of the April 11, 2011 letter to Rayford, the receipt does not show the name or address of the intended recipient of the shipment. (Tr. 322-4; RX 1). The only identifying information on Respondent Exhibit 1 is the name, "R Whitney," as the individual who signed for the shipment, and the handwriting of Dani Bowers (who did not testify at the hearing thus making her handwritten notes hearsay) which reads that the receipt is for the FedEx shipment sent to Rayford. (Rx 1). Rayford testified, without rebuttal, that no one lived at her home address with the initial and last name of "R Whitney," and neither her husband-to-be nor any of his family members, who have the last name of "Whitley" have names starting with the letter "R." (Tr. 299, 304-5). Despite the receipt showing an unfamiliar name as the individual who signed for the FedEx shipment, Young testified she did not attempt to speak with Rayford to ensure her receipt of the letter or ensure that Rayford was aware she could request to work overtime hours in the Remington account.[9] (Tr. 322-4, 326-8). Respondent did not offer any

[9] Rayford testified she continued to request permission to work overtime hours in the Remington account after April 11, 2011 but her requests were repeatedly denied by her manager and supervisors in the Waterpik account. (Tr. 300-

other evidence to establish that the April 11, 2011 letter was received by Rayford and that she was aware that Respondent would thereafter assign her to overtime hours in the Remington account upon request. General Counsel asserts, in the absence of evidence showing proof of receipt of the April 11, 2011 letter by Rayford, the Court should find the evidence insufficient to establish that Rayford received the April 11, 2011 letter and extend the backpay period for Rayford to December 31, 2011 as alleged in the Compliance Specification. (GCX 1(h)).

IV. CONCLUSION

For the reasons discussed above, the General Counsel's backpay calculations for Dotson, Smith, Kurtycz and Rayford are reasonable and appropriate and Respondent has failed to adequately demonstrate that these figures should be reduced. As such, the General Counsel respectfully urges that Respondent be required to make Dotson, Smith, Kurtycz and Rayford whole for the losses they suffered as a result of Respondent's unfair labor practices by payment to them of the backpay amounts as set forth in the Compliance Specifications and issue an appropriate remedial order adopting those allegations.

Dated: November 7, 2016

Respectfully submitted,

/s/ William T. Hearne

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1). Respondent did not offer any evidence to rebut Rayford's testimony that she was denied the opportunity to work overtime in the Remington account following the issuance of the 10(j) injunction order by the Federal District Court.

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, a copy of the Post-Hearing Brief of Counsel for the General Counsel to the Administrative Law Judge was electronically filed via NLRB E-Filing system with the Division of Judges.

Honorable Mark Carissimi
Administrative Law Judge
Division of Judges
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

I further certify that on November 14, 2016, a copy of the Post-Hearing Brief of Counsel for the General Counsel to the Administrative Law Judge was served on the following:

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/s/ William T. Hearne
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